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**DECISION**



*Dick Martin*  
*Proc II*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: D-187253

DATE: November 29, 1976

MATTER OF: Amram Nowak Associates, Inc.

**DIGEST:**

1. Protest based on contention that award selection process was improperly conducted is timely when filed within 10 working days after basis for protest became known or should have been known.
2. Where original RFP gave offerors choice of submitting one of two alternatives reflecting examples of recent work, a change after receipt of proposals requiring submittal of both alternative examples constituted discussion rather than a mere clarification and required that each offeror within the competitive range be permitted to revise its proposal.
3. Where comment on detailed and mandatory production schedule is not clearly required by solicitation, proposal offering lowest fixed price but no comment on such schedule should not have been rejected without discussion.

Amram Nowak Associates, Inc. (Nowak) protests the award to Ari-Gem Production, Inc. (Ari-Gem) of a contract pursuant to request for proposals (RFP) No. H-3957 which was issued by the Department of Housing and Urban Development (HUD). Nowak contends that its proposal price was \$3,000 less than that of the successful offeror and that its technical proposal would have been at least equal if HUD had extended to Nowak the opportunity to submit a delivery schedule.

The solicitation called for the production and delivery of 12 spot announcements for television and radio explaining the assistance available to defaulting homeowners with HUD-insured mortgages to avert foreclosure. The solicitation stated that "Contracts will be awarded to the responsible offerors whose proposals are within the competitive range and determined to be the most advantageous to the Government, price and other factors considered." The technical evaluation factors totalling 100 points allocated 50 to originality of approach, 20 to experience of the firm, producer and writer, 15 to quality of two recent television

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and two recent radio announcements and 15 points to reasonableness of the production schedule. With regard to these last two criteria the RFP provided as follows:

"3. Quality of recently produced radio and TV spots, determined by evaluation of spots submitted with proposal or critical reviews submitted with proposal (no more than two televisions and two radios)

15

"4. Reasonableness of production schedule offered

15 "

Of the 25 proposals received, 16 were determined initially to be technically unacceptable. Five of the remaining offerors, including the protester, but not Ari-Gem, were requested to and did submit additional information relative to the quality of their recent television and radio spot announcements. No other weaknesses or deficiencies were identified to these offerors or to the others.

HUD then determined that only the proposals of Ari-Gem and one other offeror, who were rated technically at 70.3 and 70.0, respectively, met the minimum technical requirements of the solicitation and were therefore within the competitive range. The proposal of Nowak was rated third with a technical score of 62, however, because the proposal did not include any production schedule, it received none of the 15 points for the reasonableness of production schedule.

On June 28, 1976, the contract was awarded for \$23,800 to Ari-Gem and Nowak, whose proposed price was \$20,857, was so notified by letter dated July 29, 1976. Nowak was informed of the specific reasons for the rejection of its proposal during a debriefing on August 17th and its protest to this Office was received on August 20th.

Nowak objects to the fact that it received none of the 15 points allocated to the reasonableness of its production schedule. It asserts that it failed to include a production schedule with its proposal because it assumed that the schedule set forth in the RFP was the required schedule.

A threshold question is the timeliness of this protest. HUD contends that Nowak's protest is untimely because it relates to a possible ambiguity of the specification. It cites our Bid Protest Procedures at 4 C.F.R. 20.2(b)(1) (1976), which provide that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals (in the case of a negotiated procurement) shall be filed prior to that date. Since the protest was filed after the award was made, HUD believes that the protest is untimely.

We find, however, that the protest is timely. Nowak is not contending that the solicitation was ambiguous. Its protest is based on the contention that the award selection process was not properly conducted. Under 4 C.F.R. 20.2(b)(2) (1976) of our Bid Protest Procedures, such protests must be filed within 10 working days after the basis for protest became known or should have been known to the protester. Nowak was made aware of the reasons for the rejection of its proposal during the August 17th debriefing. Its protest was filed 3 days thereafter. Therefore the protest was filed within the prescribed time limit.

The crux of Nowak's protest is that once HUD permitted Nowak (as well as certain other offerors) the opportunity to submit the sample film, it was "inconsistent and unfair" for HUD not to permit correction of the delivery schedule deficiency "which was obviously minor and technical and almost precisely of the same nature as the omission of the sample film." HUD's position is that it elected to award the contract on the basis of initial proposals without oral or written discussions, which was permitted under the terms of the RFP. Thus, HUD argues that the contracting officer could not give Nowak the opportunity to correct its delivery schedule omission, without conducting discussions with other offerors as well, contrary to his intention to award the contract based on the initial proposals. As for the samples, HUD states that its request for samples did not constitute discussions since the samples were requested for evaluation "as an alternative to critical reviews."

FPR 1-3.805-1(a) requires that with certain specified exceptions, written or oral discussions be held with all responsible offerors determined to be within the competitive range, price and other factors considered. One of these exceptions applies

where it can be clearly demonstrated from the existence of adequate price competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices. The authority to make an award without discussions operates only to permit acceptance of a proposal as it was initially submitted. 48 Comp. Gen. 663, 667 (1969). If discussions are held with any offeror, they must be conducted with all offerors within the competitive range. 51 Comp. Gen. 479 (1972); 50 id. 202 (1970).

The question of what constitutes discussions depends on whether an offeror has been given a chance to revise or modify its proposal. 51 Comp. Gen. 479, 481, *supra*. Thus, we have held that a requested "clarification" which resulted in a price reduction constituted discussions. 48 Comp. Gen. 663 (1969). However, an explanation by an offeror of the basis of its price reduction without an opportunity to change its proposal was held not to constitute discussions. B-170989, B-170990, November 17, 1971.

In applying these principles to this case, we believe that the request for samples constituted discussions. The RFP required offerors to submit either sample film spots or critical reviews. After proposals were received the evaluators decided that both film spot samples and critical reviews would be necessary for proposal evaluation. We do not quarrel with this determination, but we do not believe that this change in the proposal submission requirement may be categorized simply as a clarification. Once the agency decided to amend the solicitation specifications to require both samples and reviews from each offeror, it should have given each offeror within the competitive range the opportunity to revise its proposal. FPR 1-3.805-1(b).

HUD argues, however, that even if the request for samples constituted discussions, these discussions could only have benefitted Nowak and not the awardee. Therefore, HUD argues that the protester has no basis to complain that the discussions were incomplete.

We are not prepared to agree. Once written or oral discussions are initiated, the discussions should be made as meaningful as possible. Raytheon Company, 54 Comp. Gen. 169, 177 (1974), 74-2 CPD 137; and 51 id. 431 (1972). Here, for example, the protester assumed that a detailed delivery schedule was not required in view

of the delivery schedule set forth in the RFP. Aside from the statement in evaluation factor I-4 of the RFP pertaining to the "Reasonableness of production schedule offered", we do not find any other indication in the RFP that a detailed delivery schedule was required. On the other hand, Attachment A to the RFP, entitled "Statement of Work", set forth a detailed schedule of work through contract completion. While a presentation was required by the contractor during performance, before he could proceed with each enumerated phase of work, it is not clear from Attachment A that each offeror was required to submit a detailed schedule of work with its proposal.

Moreover, we are uncertain as to what details HUD expected from offerors in the way of delivery schedule submission. In this connection, HUD has furnished us with "an example of a detailed production schedule which was submitted \* \* \* by one of the other offerors". Examination of this schedule indicated to us that, with some embellishments, the offeror essentially repeated the schedule of work set forth in Attachment A of the RFP.

In short, it seems to us that meaningful discussions with Nowak might have cured the production schedule deficiency. Nowak received 62 points for its initial proposal, compared to 73 points for the successful offeror. If full discussions had been conducted, Nowak might have improved its competitive position, considering that it did not receive any points for the delivery schedule category based on its initial proposal. Therefore, we cannot say that Nowak has no basis to complain of the limited discussions which were conducted.

From the record before us, we conclude that the procurement approach followed in this case was inconsistent with the requirement for discussions. We also recommend that in the future HUD insure that its solicitation submission requirements be clearly stated and not be reasonably subject to an interpretation by offerors that no response is required.

Because the contract in this case has been completed, we are not in a position to recommend remedial action for this procurement. Moreover, the contract is not clearly illegal and we are unable to find a deliberate or arbitrary attempt to disqualify Nowak from this contract.

  
Deputy Comptroller General  
of the United States